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Supreme Court of the United States

October Term 1962

No. ~~1137~~ 1125

JOHN P. GLASS, JR. *Petitioner*

vs.

BENDIX AVIATION CORPORATION *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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In the

Supreme Court of the United States

October Term 1962

No. ———

John P. Glass, Jr.

Petitioner

vs.

Bendix Aviation Corporation

Respondent

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit entered on February 28, 1963 in Appeal No. 14,100, which affirmed the District Court's judgment dated November 7, 1962 (R. 49a) dismissing petitioner's counterclaim without a trial, for "failure to prosecute" under Rule 41-b (F.R.C.P.) while the case was advancing from the bottom to the top of the trial calendar as a "Ready" case in accordance with the applicable calendar rules, without any application for continuance (and without any failure on the part of petitioner to comply with any rule or order).

The judgments and opinions below

The District Court's judgment of November 7, 1961, dismissing petitioner's counterclaim (R. 49a), is appended hereto.

The District Court's original Opinion dated November 7, 1961 (R. 44a), upon which its aforementioned judgment

of dismissal was based, is appended hereto, and is reported at 32 FRD 375.

The District Court's subsequent Opinion (R. 61a) dated May 7, 1962, on re-argument, adhering to its aforementioned judgment of November 7, 1961 (though on different grounds), is appended hereto, and is reported at 32 FRD 375.

The per curiam Opinion of the Court of Appeals dated February 28, 1963 (affirming the District Court's judgment), is appended hereto, and is reported at 314 F. 2d 944.

The District Court's earlier Opinion of July 22, 1959 (176 F. Supp. 374) *denying respondent's earlier (1959) Motion under Rule 41-b to dismiss petitioner's counterclaim for failure to prosecute*, is also appended hereto because it is referred to in the District Court's aforementioned Opinion of November 7, 1961 upon which its judgment dismissing petitioner's counterclaim is based and is also referred to in the District Court's Opinion of May 7, 1962 on re-argument.

The Record on this Petition

The record on the foregoing Petition comprises the following:

Appendix of appellant (the petitioner herein) as filed in the Court of Appeals in connection with his aforementioned Appeal No. 14,100;—which Appendix is paginated 1a to 74a, inclusive.

Appendix of appellee (the respondent herein) as filed in the Court of Appeals in connection with the aforementioned Appeal No. 14,100;—which Appendix is paginated 1b to 21b, inclusive.

The per curiam opinion and the judgment and orders of the Court of Appeals;—as included in the certified copy of the record in the Court of Appeals, filed herewith.

The hereto-appended Supplemental Appendix (within the cover hereof), comprising the District Court's judgment and opinion of November 7, 1961 and its Opinion of May 7, 1962, the per curiam opinion of the Court of Appeals and of its judgment (dated February 28, 1963), and the District Court's 1959 Opinion denying respondent's earlier (1959) Motion under Rule 41-b to dismiss petitioner's counterclaim and certain Rules and Standing Orders of the District Court referred to but not set out on pages 6 and 7, infra;—this Supplemental Appendix being paginated beginning with page 75a.

Jurisdiction

The judgment of the Court of Appeals with respect to which the writ of certiorari is sought was entered on February 28, 1963.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1) Was the dismissal of petitioner's counterclaim under Rule 41-b (F.R.C.P.), without trial, a deprivation of petitioner of his property without due process of law?

a) where both parties had answered (and the Clerk had marked) the action "Ready" on the preliminary call of the trial calendar, and

b) where the action had thereafter been listed and advanced on the successive trial calendars as a "Ready" case under and in accordance with the applicable Rules of the District Court, without any continuance ever having been sought, and

c) where there was no failure to comply with any rule or order, and

d) where such dismissal for "failure to prosecute" under Rule 41-b was based solely on petitioner's

failure to apply to the assigned judge for a special (extra-calendar) trial-date before the Court called the case for trial (of its own accord) on the regular calendar on which it was listed and had been answered "Ready" and on which it had progressed as a "Ready" case from the bottom to the top of the calendar,* and

(e) where such special application for an extra-calendar trial-date was not required, indicated, suggested or implied by any Rule, order or published practice but was held † to be in accord with an unpublished and unannounced practice with the knowledge of which the Court found ‡ claimant's attorney *not* chargeable.

2) May the District Court so dismiss such action (petitioner's counterclaim) in reliance upon an unpublished and unannounced practice at variance with its published calendar rules applicable thereto and at variance with the calendar practice actually applied by its Clerk to the action at bar?

3) Was "the machinery of the court which moves cases along for trial . . . not working properly" §, as the Dis-

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* namely, from its position as "Ready" case No. 1022 when it was answered "Ready" on the call of the calendar on January 16, 1959 to its position as "Ready" case No. 35 on the 1961-1962 Civil Jury Trial Calendar published (during recess) on June 23, 1961 but on which the first trial-session of the Court was not scheduled until the Fall of 1961

† in the District Court's hereto-appended first Opinion (R. 44a-48a) dated November 7, 1961, upon which its hereto-appended judgment of dismissal (R. 49a) of the same date was based

‡ in the District Court's hereto-appended second Opinion (R. 61a-62a) dated May 7, 1962, in which the District Court adhered to its judgment of November 7, 1961

§ namely, was the District Court's calendar machinery "not working properly" either

because it took the action at bar slightly over two years to advance from the bottom to the top of the trial-calendar as a "Ready" case,

or

trict Court held in its second Opinion (R. 61a-62a)? *and, if so,*

3-a) was petitioner chargeable with either knowledge of or failure to realize same? *and, if so,*

3-b) was his counterclaim dismissable because he failed to do "something about" such malfunctioning of the District Court's "machinery"?

4) Was not the District Court's unpublished and unannounced practice (contrary to its own calendar rules) of not trying a protracted case which had been regularly listed, answered "Ready" and advanced on the trial-calendar, unless the claimant's attorney makes a special application to the assigned judge for a special extra-calendar trial-setting or trial-date, a violation of Rules 40 and 83 of the Federal Rules of Civil Procedure?

Constitutional Provisions, Statutes and Rules Involved

No statute is involved on this Petition.

The following provision of the Fifth Amendment to the Constitution of the United States is involved on the present Petition.

> "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

The following Rules are involved on the Petition:

Rule 40 (F.R.C.P.):

> "The district courts shall provide by rule for the placing of actions upon the trial calendar (1) without request of the parties or (2) upon request of a party and notice to the other parties or (3) in such other manner as the courts deem expedient. Precedence shall be given to actions entitled thereto by any statute of the United States."

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because in said 2-year interval the District Court called for trial (and tried) several other cases which were lower on the trial-calendar (namely, had higher calendar-numbers)

Rule 41-b (F.R.C.P.):

> "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him."

Rule 83 (F.R.C.P.):

> "Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules."

The Standing Order dated and adopted by the District Court on November 16, 1955 providing as follows:

> "Hereafter it will not be necessary for counsel to file a written order to place the case upon the Trial Calendar."

Calendar Rules of the District Court, relating to Civil Jury Trials, adopted by its Standing Order of May 2, 1958 (R. 63a-66a), appended hereto.

Calendar Rule 4, promulgated by the District Court on September 1, 1959 (R. 66a);—pertinent portions of which read as follows:

> "The Chief Judge shall annually prepare, file and cause to be published the court calendar for the ensuing fiscal year which shall establish the times for civil . . . trials . . . The calendar may be amended at any time by the Chief Judge or by any judge designated to act in his absence."

The District Court's Rules 2, 12, 13, 14 & 18, appended hereto.

the matters which petitioner believes are controlling

The District Court's hereto-appended *new* Rules 4-a & 12-d adopted *after* the date of the District Court's judgment against petitioner in the case at bar;—providing, *for the first time*, a separate trial-calendar for protracted cases and for calendar procedures and for practices specially applicable thereto.

Statement of the Case

Note: The aforementioned Appendix of appellant (filed herewith) contains a chronological list of the docket entries in the District Court and also of certain undocketed papers, correspondence between Clerk and counsel, hearings, trial-calendars and calendar-call (R.1a to 10a).

Summary of the main facts of the Case believed to be controlling

This action was commenced by respondent's complaint seeking specific performance and declaratory judgment in respect to certain patent-applications and inventions of petitioner.

Petitioner counterclaimed for monetary compensation on account of respondent's commercial exploitation and use of petitioner's aforementioned inventions.

After many proceedings and the taking of extensive depositions on behalf of petitioner (indicated at R. 1a-4a) and other subsequent proceedings (R. 4a-5a), the District Court entered an Order (docket-entry 37, at R. 5a), dismissing respondent's complaint on petitioner's motion.

Responsive to petitioner's Praecipe filed February 6, 1958 (R. 12a) requesting that his counterclaim be placed on the jury-trial calendar, the action was listed on the 1958-1959 Civil Jury Trial Calendar (R. 12a & 14a) as *case No. 1022* thereon (R. 14a), in accordance with the above-quoted Rule 40 (F. R. C. P.) and the District Court's above-quoted Rule 4 entitled "Calendar" and the District Court's Standing Order of May 2, 1958 (R. 63a-66a) governing the de-

tails of the calendaring and advancement of cases on the trial calendar.

On the preliminary call of said Calendar on January 16, 1959, both parties answered "Ready" and the Clerk so marked the case (R. 7a).

On February 19, 1959 respondent filed an unsuccessful Motion under Rule 41-b (docket-entry 60, at R. 7a) to dismiss the counterclaim for failure to prosecute.

By its Opinion dated July 22, 1959 (176 F. Supp. 374) the District Court denied respondent's aforementioned 1959 Motion under Rule 41-b (after proceedings on said Motion indicated by docket-entries 61-63, at R. 7a).

Not having been reached for trial on the aforementioned Calendar it was "Ready"-listed on successive Civil Jury Trial Calendars under successively lower calendar-numbers as it advanced from the bottom to the top of the trial-calendar.

Thus, the case was listed as *No. 376* on the 1959-1960 Calendar (R. 17a), as *No. 109* on the 1960-1961 Calendar (R. 22a), and as *No. 35* on the 1961-1962 Calendar (R. 23a & 26a) which was published on June 23, 1961 (during the Summer recess of 1961), *for trial in the Fall of 1961.*

While so "Ready"-listed as No. 35, near the top of the Calendar, for trial in the Fall of 1961, the clerk mistakenly or inappropriately sent out his form-letter dated August 22, 1961 (R. 26a) under the District Court's Rule 18 (R. 68a).

Triggered by the Clerk's aforementioned manifestly inapplicable letter under local Rule 18, respondent filed its second Motion under Rule 41-b (F. R. C. P.) on August 29, 1961, to dismiss the counterclaim "for faiure of counterclaimant to prosecute the counterclaim" (R. 27a).

As shown by the District Court's opinion of May 7, 1962 (R. 61a), petitioner's sole "failure to prosecute" was his inaction during a period of approximately two years while the case was advancing from the bottom to the top of the trial calendar as a "Ready" case; though the District Court recognized (R. 46a, lines 8 & 9) that it is not uncommon for

the matters which petitioner believes are controlling

two years to elapse between the time a case is answered "Ready" on the trial-calendar and the time it is reached for trial in the normal course and without any continuance,* and that under the applicable calendar rules of the Court (as laid down by its Standing Order of May 2, 1958), after a case has been placed on the Civil Jury Trial Calendar "all that the plaintiff ordinarily need do is to wait while the case advances automatically as the older cases are disposed of and ultimately gets a date for trial" (R. 46a).

This case having been designated as a "protracted" case on August 11, 1959 (R. 40a), responsive to a letter which respondent's attorney addressed to the Clerk a day earlier (R. 18a), the District Court, in its Opinion of November 7, 1961 held that petitioner had "failed to prosecute" within the purview of Rule 41-b because he had not made a special application to the assigned Judge for an *extra*-calendar trial-setting while the case was "Ready"-listed and advancing on the trial-calendar and before the Court actually called for trial thereon of its own accord.

In its aforementioned Opinion the District Court recognized that there was no published or announced rule or order requiring (or suggesting or implying the need for) such special application for an extra-calendar trial-setting.

Nevertheless, the District Court held that there was an unpublished and unannounced special or "prevalent practice" with reference to cases which have been designated as "protracted", as suggested in the aforementioned letter of

* at the top of page 15 of the main section of The Philadelphia Inquirer for Sunday morning, May 12, 1963, under a date-line of Washington, May 11, there is an 8-column article based on and in part quoting from a recent exchange of letters between the Chief Judge of the District Court for the Eastern District of Pennsylvania and the Administrator of the General Services Administration concerning the Court's urgent need for more courtrooms and quoting the Court as having "declared that an emergency situation exists in this district with respect to jury trials requiring at least two more jury courtrooms," and further saying, inter alia, that *litigants have to wait approximately three years before a jury case is called for trial*

August 10, 1959 (R. 18a-19a) which respondent's attorney had written to the Clerk, and that under which unpublished practice the claimant was required to make a special application to the assigned judge for a special or extra-calendar trial-setting and that failing to do so his case would never be tried notwithstanding that it was "Ready"-listed and was being advanced on the Trial Calendar in accordance with the published rules of the Court applicable to such calendar and notwithstanding the absence of any rule or order providing any different method of calendaring and advancing to trial cases designated as "protracted".

While in its subsequent Opinion of May 7, 1962 on reargument, the District Court held that petitioner's attorney was *not* chargeable with knowledge of the aforementioned unpublished and undefined "prevalent practice" with reference to protracted cases, it nevertheless adhered to its judgment of November 7, 1961 dismissing petitioner's counterclaim;—upon the theory that the machinery of the Court which moves cases along for trial (on the trial calendar) was malfunctioning because a case older than the case at bar was called for trial and tried on each of the two prior calendars (while the case at bar was not called for trial thereon notwithstanding its "Ready"-listing) and that petitioner should have recognized that the Court's machinery which advances cases to trial was not working and should have done something about it (R. 61a-62a).

Outline of the subsidiary facts and matters variously involved in the lower Court's opinions

The earlier trial-setting of petitioner's counterclaim in 1951, and Court's postponement of such trial, sua sponte

On the same day (May 7, 1951) that the Court dismissed respondent's complaint, petitioner filed a Praecipe (R. 11a) requesting the Clerk to set down for trial, on the jury-trial calendar, the counterclaim and the reply in this action.

As a result of petitioner's aforementioned Praecipe, this action was listed for trial on November 26, 1951 on petitioner's counterclaim (See *Bendix vs Glass*, 176 F.Supp. 374, at 375).

Respondent appealed from the District Court's aforementioned Order of May 7, 1951 (dismissing its complaint). Its appeal was dismissed on September 6, 1951 (*Bendix vs Glass*, —— F.2d ——; 90 PQ 321). Upon re-hearing, said Order was affirmed on February 19, 1952 (195 F.2d 267).

As a result of an Order (dated October 14, 1951) of the Court of Appeals, directing a re-argument on respondent's aforementioned appeal, the District Court (sua sponte) continued the trial on petitioner's counterclaim (*Bendix vs Glass*, 176 F.Supp. 374, at 375).

After the Mandate of the Court of Appeals (on March 10, 1952) and respondent's post-appeal motions and protracted proceedings thereon (docket-entries 42 to 55, at R. 5a-6a), the Clerk failed to restore the case to the Trial Calendar responsive to petitioner's Praecipe of May 7, 1951 (R. 11a) and failed to advise counsel that the case would not be restored to the Trial Calendar unless and until the Clerk was notified to do so by counsel for one of the parties; —notwithstanding that it was the Clerk's practice to notify counsel whenever a case was taken off the Trial Calendar by the Clerk or by the Court *sua sponte*; as shown by the Clerk's letter of December 9, 1949 (R. 11a) in respect to such removal of the case from a prior Trial Calendar, and notwithstanding the District Court's Standing Order (page 6, supra) making it unnecessary for counsel to file any praecipe or order to place the case on the trial-calendar (and hence requiring the Clerk to do so, *sua sponte*).

On January 27, 1958 the Clerk sent an undocketed form-letter to counsel (1st Item on R. 7a) under the District Court's Rule 18;—saying that the Counterclaim will be deemed abandoned and dismissed in accordance with said local Rule "unless application is made to the Court within two weeks from date of this letter".

The Court vacated the Clerk's letter of January 27, 1958 under its Rule 18 and denied respondent's *much subsequent* Motion to Dismiss under Rule 41-b, by its hereto-appended Opinion of July 22, 1959 (176 F.Supp. 374), upon the proceedings indicated by docket-entries 60 to 63 (R. 7a).

History of the case after it was answered "Ready" on January 16, 1959 on the call of the Calendar on which it was case No. 1022

Because of the then pendency of respondent's aforementioned (unsuccessful) Motion to Dismiss under Rule 41, the Clerk, *sua sponte*, de-listed the case on Part No. 1 of the 1959-1960 Calendar (see last full paragraph on R. 36a).

On July 23, 1959 the Clerk addressed a letter to counsel (R. 17a) advising that the case had been restored to the then current 1959-1960 Calendar as case No. 376½ thereon, and advising petitioner that the time for filing his Pre-Trial Memorandum (in accordance with the District Court's Standing Order of October 23, 1958 relative to pre-trials) starts running on July 23, 1959.

The affidavits of the Clerk (R. 32a-35a & 55a-57a) do not show why the Clerk gave this case "No. 376½" when he (sua sponte) so restored it to the 1959-1960 Civil Jury Trial Calendar (R.15a-17a);— instead of giving it either a lower or a higher number on said Calendar. It was however within the discretion of the Court (or the Clerk) to give this case the number (376½) which was so given to it on said Calendar when it was so placed thereon on July 23, 1959.

On July 24, 1959 (same day he received Clerk's aforementioned letter, advising the case had been restored to the Trial Calendar as No. 376½) petitioner's attorney inquired of the Clerk as to when this case might be reached for trial and also when a pre-trial hearing may be had thereon and was advised of the several then scheduled trial-sessions and pre-trial sessions, and petitioner's attorney made a memo-

randum thereof to his file;—the Clerk also advising that a schedule of pre-trial hearings would be sent to counsel (R. 37a-38a). A few days later (on July 29, 1959) petitioner's attorney wrote an extensive letter to petitioner, with a copy to his general counsel, concerning the requirements for the then expected pre-trial hearing and also concerning other matters in connection with the prospective trial of the case (R. 39a).

Respondent's request that case be assigned as a protracted case, and its request for a pre-trial hearing by assigned Judge, and deferment of trial by assigned Judge, sua sponte

On August 10, 1959 respondent's attorney wrote a letter to the Clerk (R. 18a-19a) referring to the Clerk's aforementioned letter of July 23, 1959 and counsel's estimates of the time required for trial when the case was answered "Ready" on the January 16, 1959 Preliminary Call of said Calendar, and requesting

> "that this matter be placed upon the calendar of protracted Civil Jury Trials and that it be referred to a Judge for pre-trial consideration in accordance with the prevalent practice with reference to protracted litigation."

The next day, namely, on August 11, 1959, the Clerk (no doubt at the Court's direction) made the following entry on the Trial Calendar in respect to the listing thereon of the case at bar:

> *8-11-59—Protracted case—WHK not to be tried before January 1, 1960*" (R. 17a)

The Court's above-quoted *direction* to Clerk (and the latter's notation thereof on the Trial Calendar) *that the case was "not to be tried before January 1, 1960"* was made without any prior communication between Court (or Clerk)

and petitioner's attorney with respect to the assigned Judge's so indicated wish to defer the trial.

On August 21, 1959 petitioner's attorney filed a Motion (R. 19a-20a) for a 20-day extension of time to file his Pre-Trial Brief;—saying that he had contacted one of respondent's attorneys and was advised that respondent "*has no objection to an extension of counterclaimant's time for filing pre-trial Brief*".

On September 1, 1959 the Clerk wrote a letter (R. 20a) to counsel, with a copy to the Court, saying that the case had been designated as a protracted case and had been assigned to The Honorable William H. Kirkpatrick for trial, and that all applications concerning the case should be made to him;—further saying that petitioner's Motion for extension of time for filing his pre-trial Brief had become moot and would not be listed for hearing because the District Court's Standing Order of October 23, 1958 relating to pre-trial conferences does not apply "to this type of case and arrangements *for a pre-trial conference* should be made directly with the Judge" (emphasis ours).

This letter of the Clerk (R. 20a) did *not* say or suggest anything about any need for applying to or making any special arrangements with the assigned Judge for a special trial-date in order to obtain a trial or that the case would not be called for trial unless such special request for a trial were addressed to the assigned Judge, or that the Standing Order of May 2, 1958 (R. 63a-66a) did not apply to this case.

The case was not reached for trial on the aforementioned 1959-1960 Calendar (R. 15a-17a) and hence was thereafter listed on Part No. 1 of the 1960-1961 Calendar (R. 21a-22a) as case No. 109.

On June 17, 1960, which was two days after the receipt of the copy of said 1960-1961 Calendar, petitioner's attorney had his Office Manager phone the Clerk to inquire as to when and in what manner the case at bar may be reached for trial, and the Clerk advised that

"Judge Kirkpatrick does not sit on cases on the regular list and if the case is assigned to him, the Clerk waits for *the Judge to say when he is ready to try the case*" (R. 40a-41a)

The informal telephone conversations relative to trial, initiated by assigned Judge in September of 1960*

Three months later, namely, towards the end of September of 1960, the Clerk phoned petitioner's attorney at the assigned Judge's direction, and spoke to him about the trial of the case (R. 34a and 71a-74a);—and at the Clerk's suggestion petitioner's attorney thereupon talked to the assigned Judge over the phone concerning the trial of the case (R. 59a-60a).

No memorandum was made of these conversations.

While the respective unaided recollections of the Clerk and of petitioner's attorney are different, *the Judge's recollection* (of what he requested the Clerk to ask petitioner's attorney) *supports the recollection of petitioner's attorney.*

The Clerk's recollection (more than a year after the event) was that his instruction from the assigned Judge was

"to ascertain from counsel whether the case would be ready for trial before the first of the year".

and that when he talked to petitioner's attorney the latter

"stated that he was considering taking further depositions and was soon to confer with his co-counsel about the case, and that he was not ready for trial" (R. 34a).

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* the year "1959" in the first line and the year "1960" in the 3rd & 7th lines of the last paragraph (R. 48a) of the Court's *first* Opinion (R. 43a-48a) should have been *1960* and *1961*, respectively, in view of paragraphs 11, 12 & 13 (R. 34a) of the Clerk's first Affidavit (R. 32a-35a), and, accordingly, it has been assumed throughout this Petition that the statements in the last paragraph of the Court's *first* Opinion (R. 48a) were intended to refer to the end of September 1960 and to the first of January 1961, respectively

According to the recollection of petitioner's attorney, the Clerk told him that the assigned Judge

> "would like to know whether you (petitioner's attorney) are insistent on trying this case before the first of the year (1961) because he has other duties, and if you don't insist he would prefer not to go on with the case before the first of the year" (R. 73a),

and that his reply to the Clerk was

> "that if the Judge prefers not to try the case before the first of the year, we will not insist, we don't have to have it tried before the first of the year". (R. 73a).

The assigned Judge made the following statements (inter alia) bearing on the differences between the respective recollections of the Clerk and petitioner's attorney:

> "I don't remember the exact language that I used in talking to (the Clerk) about it, but I wanted him to find out. *I am sure* that I didn't urge him, *that I didn't tell him that I wanted to try the case or anything of that sort**. It was just an inquiry that I wanted him to make, as to whether you wanted the case tried before the first of the year. I think that's all there was to it. I am sure I didn't intend to urge you to do it. *He (the Clerk) may very well have said, 'Well, the judge doesn't care much about having this put upon the trial list before the first of the year'.** I don't know what he said, but that; I don't think makes very much difference. I don't think the whole thing makes any real difference". (R. 74a)

The clerk made no entry or notation either upon the docket or upon the calendar nor upon any other public record to indicate any continuance or deferment of the trial of the

* emphasis supplied

case (by reason of the aforementioned informal conversations over the telephone), and insofar as could be gleaned from the Calendar and any other public record maintained by the Clerk, the "Ready" status of the case upon the Calendar (under the subject to the rules set out in the Standing Order of May 2, 1958: R. 63a-66a) was not in any way altered by reason of the aforementioned informal telephone conversations (or otherwise).

Upon its consideration, of respondent's subsequently sustained Motion (R. 27a) to Dismiss the Counterclaim for failure to prosecute, the Court concluded that these differences in the recollections of Clerk and petitioner's attorney did not make "any real difference" (R. 74a) and were not "of any importance" (R. 48a).

Case not reached for trial on 1960-1961 Calendar listing it "Ready"

The case was not reached for trial on the aforementioned 1960-1961 Calendar (R. 21a-22a) and hence was thereafter listed as No. 35 on the 1961-1962 Calendar (R. 23a-26a) which was published on June 23, 1961 for Preliminary Call on July 26, 1961;—this Calendar (like the prior Calendars) containing a Notice to the Bar that "It will not be necessary for counsel in cases numbered" within a range including the number of the case at bar "to appear on the day of the call, those cases having been on previous Trial Calendars" (R. 23a).

Clerk's letter under local Rule 18 and respondent's Motion under Rule 41-b during summer recess of 1961, while case listed on 1961-1962 Calendar as "Ready" for trial-session in Fall of 1961 and proceedings on said letter and Motion

Petitioner's attorney was in the midst of preparations for the expected trial of this case so scheduled for the Fall of 1961 (R. 41a) when he received the Clerk's untimely

form-letter of August 22, 1961 (R. 26a-27a), saying that the record in the case indicates that no proceeding "has been docketed herein for a period of two or more consecutive years" and that "unless the Court, upon application filed within 30 days . . . shall otherwise order, the action will be dismissed" under Rule 18, "and upon application by defendant (the Clerk) will tax the costs against the plaintiff".

This was followed by a conference between the Court and counsel on August 29, 1961 (R. 8a), and on the same day respondent filed its Motion (R. 27a) to Dismiss the Counterclaim under Rule 41 (F.R.C.P.) for failure to prosecute, accompanied by the Affidavit of its attorney (R. 28a-30a).

Within the 30-day period stated in the Clerk's aforementioned form-letter under Rule 18 (R. 26a-27a), namely on September 11, 1961, petitioner filed his Motion to strike the Clerk's aforementioned Notice dated August 22, 1961 under local Rule 18 and his Application that his Counterclaim be not dismissed under said Rule (R. 31a).

The Clerk's two Affidavits bearing on respondent's Motion under Rule 41-b

On October 6, 1961 the Clerk's *first* Affidavit (R. 32a-35a) was filed, and on December 1, 1961 the Clerk's *second* Affidavit was filed (R. 55a-57a).

Without citing any published rule or order (or any other published or posted writing) as authority therefor, the *Clerk, in his first Affidavit* made the following inconclusive statement:

> "The procedure for . . . ready list, pool, and assignment by the calendar judge from the pool to a judge for trial established by the Standing Order of the Court adopted May 2, 1958* has not been and is not being applied to cases which have been designated as protracted" (R. 33a).

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* the Standing Order of May 2, 1958 is reproduced at R. 63a-66a and also appended hereto

and that the practice in a case designated as a "protracted" one, is that "arrangements for trial of the case . . . must be made with" the judge to whom the case had been assigned as a "protracted case" (R. 33a).

The Clerk's *second* Affidavit (R. 55a-57a) shows, however, that the unspecified and unexplained "*prevalent practice* with respect to protracted litigation" referred to in the letter of August 10, 1959 (R. 18a-19a) from respondent's attorney to the Clerk, and what the Clerk's *first* Affidavit stated as being

> "*the prevailing practice* in this Court after a case has been designated as protracted and assigned to a judge for trial"

was not according to any Rule or Order and was never published nor otherwise ever announced and was indeed at variance with the rules for calendaring and advancing cases for trial provided by the Standing Order of May 2, 1958 (R. 63a-66a), which the Clerk's *second* Affidavit states governed *all* civil jury cases (R. 56a).

The Clerk's *first* Affidavit also states, *without any explanation*, that the last case tried during the 1959-1960 term and that the last case tried during the 1960-1961 term, each had a calendar-number higher than the calendar-numbers of the case at bar on the respective Trial Calendars.

Moreover, the Clerk's first Affidavit is silent on whether all cases bearing a calendar-number higher than that of the case at bar had been tried during each of the aforementioned terms and whether the two identified cases had in some way been advanced over others, or whether other cases had been advanced or retarded in relation to each other, or whether the turn of the case at bar had in fact been reached on the Trial Calendar and, if so, why it was not called for trial in accordance with the rules provided by the admittedly applicable Standing Order of May 2, 1958.

Petitioner's Affidavit and Motion for leave to examine Clerk

On October 18, 1961 petitioner filed his Affidavit, saying that

> "It was never my intention and is not now my intention to abandon the action represented by my Counterclaim. It is and always has been my intention to press the Counterclaim to trial." (R. 42a)

Upon the Hearing on October 18, 1961 (R. 43a-44a & 71a-74a) on respondent's Motion to dismiss under Rule 41, petitioner moved to examine the Clerk in open court (R. 43a & 72a) but this Motion was denied (R. 44a & 74a).

Court's first Opinion dismissing Counterclaim on respondent's Motion under Rule 41-b and petitioner's Motion for re-argument

On November 7, 1961 District Court rendered its Opinion (R. 44a-48a) sustaining respondent's Motion to dismiss under Rule 41-b (F.R.C.P.) and on the same day entered its Judgment (49a) dismissing the Counterclaim.

On November 17, 1961 petitioner filed his timely Motion for the Reargument (R. 49a-51a), and as part thereof also moved "for leave to take the deposition of the Clerk of the Court as to practice and procedure in the Clerk's office relevant to this case and to cases of similar nature" (R. 51a) in accordance with petitioner's aforementioned Motion therefore made in open court on October 18, 1961.

On March 28, 1962 the District Court filed a Memorandum (R. 58a) granting petitioner's Motion for Reargument and fixing a time for a Hearing thereon.

Upon the Hearing on April 18, 1962 (R. 58a-61a) on

his Motion for re-argument, petitioner again sought (unsuccessfully) to examine the Clerk orally in open court (R. 60a).

The Clerk's Second Affidavit bearing on respondent's Motion under Rule 41-b

The *Clerk's second Affidavit* (R. 55a-57a) makes it abundantly clear that any *special* practice with respect to a so-called "protracted case" which would differentiate it from any other case on a Civil Trial Calendar or which would render the Standing Order of May 2, 1958 (with respect to the ready-listing, pool-listing, etc.) inapplicable thereto, was at best only a wholly *un*published and *un*articulated practice initiated on or about February 28, 1958 merely by the Clerk starting and thereafter maintaining an entirely *private* list of such "protracted" cases, without either such list or any procedure with respect thereto ever having been published or even posted in the Clerk's office, and further shows that petitioner's attorney at bar has never appeared as attorney or counsel for any party in any case on such *private* list of protracted cases excepting only the case at bar which the Clerk had presumably placed on his said private list on or about August 11, 1959 (R. 55a-56a). See page 28 infra

Court's second Opinion adhering to its prior dismissal of the Counterclaim on respondent's Motion under Rule 41-b repudiates basis of its first Opinion and Judgment

On May 7, 1962 the District Court rendered its second Opinion (R. 61a-62a) adhering to its original decision and refusing to vacate its Judgment (R. 49a) of dismissal, but holding that petitioner's attorney was not chargeable with knowledge of the aforementioned unpublished practice relating to protracted cases upon which its first Opinion and Judgment of November 7, 1961 were based.

Argument

Judgment below without due process and goes counter to all applicable precedents

The District Court's Judgment of November 7, 1961* dismissing petitioner's counterclaim without trial, and its published Opinions of November 7, 1961 and May 7, 1962, deprive petitioner of his property without due process, and are such an unprecedented and gravely unsettling violation of the *due process* provision of the Fifth Amendment to the Constitution of the United States as to be vested with paramount public interest and as to incline this Court to issue a Writ of Certiorari in respect to judgments below.

Societe Internationale vs Rogers, 357 U. S. 197, (2 L. Ed. 2d 1255)

YuCong vs Trinidad, 271 U. S. 500, 518 (70 L. Ed. 1059, 1067)

Jordan vs DeGeorge, 341 U. S. 223, 231 (95 L. Ed. 886, 892)

Burstyn vs Wilson, 343 U. S. 495, 533 (96 L. Ed. 1100, 1122)

Jefferson vs Stockholders, 194 F. 2d 281

Connally vs G[illegible] al, 269 U. S. 385, 391 (70 L. Ed. 322, 328)

There being a complete absence of any valid basis therefor in law or in fact, the dismissal of petitioner's counterclaim without trial violates the constitutional requirement of due process of law as pointed out in *Societe Internationale vs Rogers*, supra.

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* affirmed by the Judgment of the Court of Appeals dated February 28, 1963.

In the case at bar the Court below dismissed a regularly calendared case before it was reached or called up for trial on the calendar under its published calendar rules,

1) first on the basis of its admittedly unpublished (and not generally known), and undefined practice in connection with protracted cases (with the knowledge of which petitioner's attorney was later held not chargeable) and

2) then * on the basis of the malfunctioning of the Court's machinery which "moves cases along for trial" † and petitioner's failure to do "something about it" (R. 61a-62a).

This Court held in *Connally vs General Construction Co.* 269 U. S. 385, 391 (70 L.Ed. 322, 328) that even

> "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law".

To the same effect is the holding in *Yu Cong Eng vs Trinidad*, 271 U. S. 500, 518 (70 L.Ed. 1059, 1067):

> ". . . the principle that a statute which requires the doing of an act so indefinitely described that men must guess at its meaning, violates due process of law",

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* after abandoning the first basis, on Reargument

† insofar as the case had not advanced on the Trial Calendar more rapidly than from its position as case No. 1022 in January of 1959 to its position as case No. 35 during the summer recess of 1961, and insofar as another case bearing a higher calendar number was tried during the 1959-1960 term and a case bearing a higher calendar number was tried during the 1960-1961 term

and the holding in *Jordan vs DeGeorge*, 341 U. S. 223, 231 (95 L.Ed. 886, 892) that the test of due process is

". . . whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices".

A fortiori, a practice of the District Court in connection with protracted cases which was admittedly not according to any rule or order and which was indeed never published and could not be gleaned from any writing (and with the knowledge of which claimant was held not chargeable), is manifestly too vague and indefinite as a basis for the determination of substantial property rights to satisfy the constitutional requirement of due process of law.

A litigant can likewise not be charged with the malfunctioning of the Court's machinery "which moves cases along for trial" nor with any duty to perceive or do "something about it";—such requirements being manifestly too vague and indefinite to satisfy the *due process* requirements where a litigant is to be deprived of his property on the basis of such charges.

A litigant can not be charged with the malfunctioning of the Court's machinery "which moves cases along for trial" nor with any duty to perceive or do "something about it";—such requirements being too vague and indefinite to satisfy the *due process* requirements where a litigant is to be deprived of his property on the basis of such charges.

Moreover, in the case at bar, such alleged malfunctioning was in any event not so apparent as to make claimant chargeable with knowledge thereof, because the case had been advanced almost a thousand positions on the Trial Calendar between the time when it was first answered and marked "Ready" on the preliminary call thereof and the time during the summer recess of 1961 when respondent filed its Motion to Dismiss for failure to prosecute.

Furthermore, the supposed malfunctioning of the Court's machinery "which moves cases along for trial" was not so apparent as to make claimant chargeable with the

knowledge thereof, because it was either not apparent to the Court or to the Clerk (and his staff) or they deemed such supposed malfunctioning to be either de minimus or not a real malfunctioning at all or not a real deviation from the norm;—again showing that such malfunctioning of the Court's machinery and litigant's duties to do something about it are too vague and indefinite to satisfy the requirement of *due process*.

It should be axiomatic that a litigant can not be penalized by depriving him of his property, because of any failure on the part of the Clerk or the Court in the administration of the Court's machinery or because the litigant failed to do something about a malfunctioning of the Court's machinery.

In *Jefferson vs Stockholders Publishing Co.*, 194 F.2d 281 (9 Cir. 1-18-52) the Clerk did not issue the Summons forthwith upon the filing of the Complaint, as required by Rule 4-a (F.R.C.P.), in the mistaken belief that an undertaking for costs was required of plaintiff (which undertaking plaintiff had not filed or tendered). Upon the service of the Summons issued by the Clerk more than seven months later, the District Court dismissed the action on a Motion under Rule 41-b (F.R.C.P.) on the ground that plaintiff had failed to comply with Rule 4-a (F.R.C.P.).

In reversing such dismissal, the appellate court held that the failure to comply with Rule 4-a had been that of the Clerk and that

> "the Clerk's failure to comply with Rule 4-a was not attributable to appellant".

The principle of *Jefferson vs Stockholders*, supra, applies with greater force in the case at bar, because while in that case there was an explicit rule (Rule 4-a, F.R.C.P.) as to which there had been a failure to comply*, in the case at bar whatever "failure" may be said to have existed (and irrespective of whether such failure be deemed that of the

* whether such failure to comply was that of the litigant as held by the District Court, or that of the Clerk as held by the Appellate Court

Clerk, the Court or petitioner, such failure was not a failure in respect to any rule, order or published practice.

A litigant should not be deprived of his property under Rule 41-b for any alleged "failure" to comply with an unpublished practice (with the knowledge of which he was held not chargeable) or because of his failure to realize that "the machinery of the Court, which moves cases along for trial, is not working properly" or for his failure to do something about the Court machinery outside the scope and indeed contrary to the Calendar Rules of the Court under which he had answered "Ready" and the administration of which Rules is the exclusive province of the Clerk, the Calendar Judge and the assigned Judge.

The District Court's Judgment dismissing petitioner's counterclaim is a serious violation of Rules 40 and 83 of the Federal Rules of Civil Procedure

Rule 83 (F.R.C.P.) grants authority to the District Courts to make local rules "governing its practice not inconsistent with" the Federal Rules of Civil Procedure, and provides that "copies of rules and amendments so made by any District Court shall on promulgation be furnished to the Supreme Court of the United States."

Rule 83 necessarily implies that only such practice of a District Court may be regarded as one of its "rules governing its practice" as has been promulgated by publication and, conversely, that a practice of a District Court which has not been promulgated by publication may not be deemed to be one of its "rules governing its practice".

Rule 40 (F.R.C.P.), entitled "Assignment of Cases for Trial", specifies that

> "The district court *shall provide by rule* for the placing of actions upon the Trial Calendar . . ."

affirmed by the Judgment of the Court of Appeals dated February 28, 1963

and commits to their discretion only the manner in which the actions shall be placed upon the Trial Calendar *by rule.*

The word "rule" as used in Rule 40 (F.R.C.P.) must be deemed to mean a *written* rule, namely one which has been promulgated and so can "be furnished to the Supreme Court of the United States" in accordance with Rule 83 (F.R.C.P.)

By its Standing Order of May 2, 1958 (R. 63a-66a) the District Court commanded its Clerk to publish, from time to time, a list of cases for preliminary-call for jury trials.

The Clerk has published such lists of cases, from time to time, for preliminary-call for jury trials, and such lists of cases have been regularly designated by the Clerk as the "Civil Jury Trial Calendar" (R. 12a, 15a, 21a & 23a) and such lists have been the *only* civil jury trial calendars ever published during the times herein concerned (R. 55a).

Long before 1955 it had been the general practice for the Clerk to place actions upon the Trial Calendar upon the written request, order or praecipe of counsel for one of the parties.

On November 16, 1955 the District Court adopted a Standing Order which made such *praecipe* of a party unnecessary, by providing that

> "Hereafter it will not be necessary for counsel to file a written order to place the case upon the Trial-Calendar."

The Standing Order of May 2, 1958 (taken together with its Standing Order of November 16, 1955) constituted the District Court's rules for the "Assignment of Cases for Trial" within the purview of Rule 40 (F.R.C.P.).

Such rules of the District Court for the assignment of cases for trial (comprised of its aforementioned Standing Orders) were manifestly applicable to *all* civil actions, which (like the case at bar) are to be tried to a jury, both (1) because the Standing Order of May 2, 1958 by its

terms applies to the assignment of *all* civil cases for jury trials and (2) because the District Court had no other rule for the assignment of protracted civil cases for jury trial during the times herein concerned, as shown by the Clerk's *second* Affidavit (R. 55a-57a) expressly stating that during all times herein concerned:

> "I know of no published or unpublished writing in the Clerk's office, by way of written Rule or Standing Order or written direction or memorandum exempting a protracted case from the Standing Order adopted May 2, 1958 (entitled 'Civil Jury Trials') or indicating that a protracted case is reached for trial in any way different from that stated in the Standing Order adopted May 2, 1958." (R. 56a)

Moreover, the case at bar was placed upon the Civil Jury Trial Calendar at petitioner's request, and was answered "Ready" by both parties upon the preliminary call of such calendar, and was thereafter continuously kept on the successive Calendars as a "Ready" case (but with successively lower calendar-numbers) because it was not reached on the previous calendar;—all fully in accordance with the Standing Order of May 2, 1958.

The assignment of the case at bar to a particular Judge, long before it could be reached on the calendar in its regular turn, was not inconsistent with or different from the practice provided by the Standing Order of May 2, 1958, namely, that *the Calendar Judge shall assign each "Ready" case to a trial Judge*

Under the published rules of the District Court the early (Aug. 11, 1959), assignment of the case to his Honor Judge Kirkpatrick (R. 17a & 20a) meant nothing more than that when the case was reached on the Civil Jury Trial Calendar, the Clerk or the Calendar Judge would notify his Honor Judge Kirkpatrick, and would then call up the case for trial (subject of course to Judge Kirkpatrick's convenience and control).

Conclusion

In conclusion it is respectfully submitted that a writ of certiorari should be granted to review and correct the decisions below.

Respectfully submitted,

Leonard L. Kalish
Leonard J. Schwartz
Fox, Rothschild, O'Brien & Frankel
attorneys for defendant

Supplemental Appendix

Opinion

Sur Motion to Dismiss for Failure to Prosecute
(Docket Item 74, filed November 7, 1961)

Before Kirkpatrick, J.

This is a motion under Rule 41(b) to dismiss for failure to prosecute. The pleadings consist of Glass's counterclaim for money damages which has survived the dismissal of the complaint, and Bendix's reply thereto, and, consequently, Glass is in the position of a plaintiff within the terms of the rule.

The transactions giving rise to the counterclaim occurred in the course of Glass's employment with the corporation (Bendix) which terminated 16 years ago. A jury trial has been demanded. Proof by either party will require oral testimony, and counsel for Bendix states that a number of persons having knowledge of the facts are no longer in its employ, the whereabouts of some of them being unknown.

The complaint was filed in 1948. Between that time and July 22, 1959, there were two periods of time, one of about eight months and one of about a year, during which delay was not certainly chargeable to the counterclaimant's inaction, leaving something more than 11 years during which the counterclaim, for whatever reason, remained dormant.

In 1959, as a result of the delay, Bendix moved under Rule 41(b) to dismiss the counterclaim. After hearing argument and being mindful of the reluctance of courts to enter default judgments, I came to the conclusion that there was just enough excuse for the counterclaimant's inactivity to allow him another opportunity to prosecute his case, and I denied the motion to dismiss on July 22, 1959.

From that time to the present, the material facts are as follows: (1) on July 23, 1959, the case was placed by the Clerk upon the civil jury trial calendar and counsel for the counterclaimant was notified, (2) about two weeks later the case was designated a protracted case and assigned to the writer of this opinion for trial—again (on September 1, 1959) counsel for the counterclaimant was notified. At the same time, in response to his motion for an extension of time to file a pretrial brief, he was also notified that "the Standing Order of October 23, 1958* does not apply to this type of case and arrangements for a pretrial conference should be made directly with the judge." Thereafter, on August 29, 1961, more than two years after his last step in the cause, no action having been taken in the meantime by the counterclaimant, Bendix filed this motion to dismiss.

The principal ground upon which the counterclaimant's counsel seeks to relieve himself and his client of responsibility for the delay is the fact that the case, at all times after it escaped dismissal in 1959, was upon the civil jury trial calendar.

Under the practice of this court, when a case has been designated as "protracted", the steps necessary to bring it to trial are entirely different from those which are prescribed in an ordinary case. In the latter, after it has been placed upon the civil jury trial list, all that the plaintiff ordinarily need do is wait while the case advances automatically as the older cases are disposed of and ultimately gets a day for trial. This may in some cases be a matter of two years. A protracted case on the other hand does not share in the automatic advance of cases upon the regular trial calendar, but arrangements fixing dates for pretrial and trial must be made with the judge to whom the case has been assigned.

The counterclaimant's counsel was fully aware of the distinction and, moreover, had had it particularly called to his attention by the Clerk in the latter's letter of September

*Governing pretrial procedure.

1, 1959. Not only that, but counsel who stated that his office had been following the civil jury trial list could not have helped seeing that cases with higher numbers than his (meaning that they had been placed on the trial list after his) were being tried—a plain indication that his case was not moving ahead. In addition, he was advised by the Clerk that his case had been assigned to a senior judge who did not sit for the trial of cases on the regular civil jury trial list but took cases by special assignment only.

In the earlier motion to dismiss for want of prosecution made in 1959, I accepted as a valid excuse for a large part of the delay the fact that counsel did not know that the case (which had not at that time been designated a "protracted" case) had been removed from the regular trial list and had no reason to think that it would not be automatically reached for trial in due time.*

There is now no such extenuating circumstance. The counterclaimant's attorney knew that the case would not be tried until arrangements were made with the judge. He took no steps of any kind looking toward such arrangements, possibly relying upon the thought that it was safe to do nothing on the principle of letting sleeping dogs lie. At any rate, "failure to prosecute" under the rule does not mean that the plaintiff must have taken any positive steps to delay the trial or prevent it from being reached by operation of the regular machinery of the court. It is quite sufficient if he does nothing, knowing that until something is done there will be no trial.

Although there is no local rule governing the procedure in protracted cases, the practice is well understood, particularly by lawyers with as much familiarity with federal practice as the counterclaimant's counsel. Nor is he unfamiliar with Rule 41(b). In addition to the earlier motion

* The only question was, as stated in the opinion, "How soon should a party realize that the machinery of the court, which moves cases along for trial, is not working properly and that the trial of his case will in all probability be indefinitely deferred unless he does something about it?".

to dismiss in this case, he was counsel in another case which was dismissed for failure to prosecute and in which the dismissal was affirmed by the Court of Appeals in an opinion* in which the whole subject was thoroughly reviewed, and in still another† in which he escaped dismissal on the principle of pari delicto‡.

I cannot agree that it is the duty of the judge to whom a protracted case has been assigned to get in touch with counsel and urge or require him to go to trial, even though it would be within his power to do so. The judge in the present case was engaged in at least four other protracted cases one of which consumed 30 actual days of trial, and a judge should not be burdened with keeping track of cases which counsel for the plaintiff obviously does not want to try, when other counsel in other cases are pressing to have their cases disposed of. Nor is the defendant under any duty to take any steps to bring the case to trial.

The responsibility is squarely up to the plaintiff and his attorney. The counterclaimant's counsel has argued the case as though the action were a brand new one which had been regularly listed for trial in July 1959 when I denied the earlier motion to dismiss. However, while that order allowed the case to remain on the books, it did not wipe out past history so far as the issue of want of prosecution raised by subsequent inactivity is concerned. I think that I am fully justified in bearing in mind the chronology of this case before the 1959 order in considering whether there is now or ever has been any genuine intention to get this to trial.

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* Ordnance Gauge Company v. Jacquard Knitting Machine Co.

† Tinnerman Products, Inc. v. Garrett Company, 22 F.R.D. 56.

‡ By its Order dated January 23, 1962 (page 57a, infra, the Court amended the last portion of this sentence to read:

"in which his adversary escaped dismissal for the reason that his (counsel's in the present case) client was in pari delicto"

At the end of September 1959*, the Clerk at my direction inquired of counsel whether or not they would be prepared for trial before the first of January 1960* and was advised that they would not be. Counsel for the counterclaimant asserts that he was told that the judge did not wish to try the case before the first of January 1960. It may be that he misinterpreted the Clerk's message, However, I do not think this of any importance. Even on counsel's version of the occurrence, it would account for a delay of only three months and it does not account for the fact that he did not get in touch with the judge after the first of the year or at any other time to see whether or not whatever had impeded his case was still doing so. Moreover, he advised the Clerk at that time that he was considering taking further depositions and was not ready for trial on that account. No depositions were taken, and he now advises the Court that he does not intend to take any. Inasmuch as the case will be dismissed under Rule 41(b), it is unnecessary to consider the local two year rule.

The motion to dismiss is granted.

JUDGMENT

(Docket Item 75, filed November 7, 1961)

BEFORE KIRKPATRICK, J.

AND NOW, November 7, 1961, in accordance with the opinion this day filed, it is ordered that the counterclaim in the above entitled matter is dismissed for failure to prosecute, with cost

BY THE COURT

ATTEST R. J. GREENWOOD
Deputy Clerk

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* the year "1959" in the first line and the year "1960" in the 3rd & 7th lines of the last paragraph (R. 48a) of the Court's *first* Opinion (R. 43a-48a) should have been *1960* and *1961*, respectively, in view of paragraphs 11, 12 & 13 (R. 34a) of the Clerk's first Affidavit (R. 32a-35a), and, accordingly, it has been assumed throughout this Brief that the statements in the last paragraph of the Court's *first* Opinion (R. 48a) were intended to refer to the end of September 1960 and to the first of January 1961, respectively

OPINION

Sur Re-argument of Motion to Dismiss for Failure to Prosecute

(Docket Item 84, Filed May 7, 1962)

Before Kirkpatrick, J.

I adhere to my original ruling* that this case must be dismissed for want of prosecution.

I am satisfied that counsel for the counterclaimant was not aware of the practice of this court followed in the listing for trial of protracted cases, which existed in 1959-1962 and which, at that time, was not embodied in any rule of court. I, therefore, feel that he can be absolved of disregard of an established practice of the court. However, it is still apparent that, with knowledge that his case was not progressing to trial along with other cases listed on the trial calendar, he did nothing to keep it moving and, in fact, when inquiry was made by the Court in September 1959x as to his readiness for trial, stated that he would have to take more depositions—which in fact have never been noticed.

Taking all this in connection with the history of this 14 year old case†, it seems to me that what I said in a previous opinion, "How soon should a party realize that the machinery of the court, which moves cases along for trial, is not working properly and that the trial of his case will in all probability be indefinitely deferred unless he does something about it?", is still fully applicable. The answer in this case is that the counterclaimant has waited too long.

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*Opinion filed November 7, 1961.

x "1959" should be 1960, for the reasons pointed out in the footnote on page 15 of the Petition

† "The complaint was filed in 1948, . . . In 1959, as a result of the delay, Bendix moved under Rule 41(b) to dismiss the counterclaim. After hearing argument and being mindful of the reluctance of courts to enter default judgments, I came to the conclusion that there was just enough excuse for the counterclaimant's inactivity to allow him another opportunity to prosecute his case, and I denied the motion to dismiss on July 22, 1959." (Opinion filed November 7, 1961.)

Opinion of the Court (of Appeals)

(Filed February 28, 1963)

Per Curiam:

On November 7, 1961, pursuant to the District Court's Opinion filed that day, judgment was entered dismissing appellant's counter claim for failure to prosecute. On May 7, 1962, following re-argument, the District Court adhered to its original ruling of dismissal.

On review of the record we can find no error. The Judgment of dismissal of November 7, 1961, will be affirmed for the reasons so well stated in Senior Judge Kirkpatrick's Opinions of November 7, 1961 and May 7, 1962.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit.

JUDGMENT

(of the Court of Appeals)

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered November 7, 1961 in this case be, and the same is hoereby affirmed, with costs.

ATTEST: IDA G. CRESKOFF, CLERK

February 28, 1963

Opinion

(filed July 22, 1959)

Sur Plaintiff's Motion to Dismiss the Defendant's Counterclaim for Want of Prosecution
(176 F. Supp. 374)

Before Kirkpatrick, J.

This action began on June 4, 1948, with a complaint by Bendix for a declaratory judgment. The controversy out of which it arose and an account of the early procedural steps are set forth concisely in Judge Maris' opinion in 195 F.2d 267 at pages 272 and 273 and need not be repeated here, except to say that this Court dismissed the complaint on May 7, 1951, (an order subsequently affirmed by the Court of Appeals) and that, since that time, the only part of the action which has survived is the claim for money damages asserted by the defendant, Glass, in his counterclaim.

On the same day on which the complaint was dismissed, the defendant ordered his counterclaim on the trial list, and as a result it was listed for trial on November 26, 1951. Sometime prior to that date the Court continued the case for the reason that the Court of Appeals had ordered a reargument of its decision affirming this Court's dismissal of the complaint.

In cases deferred for this or similar reasons, it was the clerk's practice not to relist the case for trial until the reason for deferment had come to an end.

On March 10, 1952, the mandate of the Court of Appeals, finally affirming this Court's order of dismissal of the complaint, came down and it was to be expected that in the normal course of things the clerk would restore the counterclaim to the active trial list without the necessity of any action on the part of the defendant. However, for some reason this was not done. Shortly before August 27, 1953, the clerk, in the course of making up the trial list for the following October, notified counsel for the counterclaimant

that the case would appear on the list about to be published. He was advised by the counterclaimant's attorney that the case was "not ready for trial" * and refrained from placing it on the active trial list.

Thereafter, for more than four and a half years, or until February 6, 1958, the case lay dormant. It did not appear upon any of the numerous trial lists published during that period and the counterclaimant's counsel made no effort to see to it that it did or to find out why it did not.

On February 6, 1958, the counterclaimant once again ordered the case on the trial list * and at the same time filed a motion that the case be not deemed abandoned. The plaintiff opposed this motion but argument upon it was postponed from time to time awaiting the decision of the Court of Appeals in a similar case (Ordnance Gauge Co. v. Jacquard Knitting-Machine Co., 265 F.2d 189, February 18, 1959).

The present case appeared upon the preliminary call list which was called on January 16, 1959, at which time the case was marked "ready" at counterclaimant's direction.

On February 19, 1959, the Court of Appeals having filed an opinion in the Ordnance Gauge case which pointed out that, although the Two Year Rule could not be invoked, a motion to dismiss under Rule 41(b) of the Federal Rules was available, the plaintiff filed this motion under 41(b).

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* The above finding does not involve the slightest suggestion that Mr. Kalish in his testimony was anything but honestly mistaken. However, it is clear that he relied very largely upon his office record of telephone calls. It is quite possible that he may have called from his home or some other place or been personally in the clerk's office without remembering it, and I cannot explain the clerk's positive act in noting the request on his calendar card on any ground other than that he was so notified.

* The counterclaimant was impelled to take this action by the receipt of a notice from the clerk that the case would be dismissed under a local rule known as the "Two Year Rule." It is agreed by both parties that the Two Year Rule was improperly executed and that the case could not have been dismissed under its provisions.

It is well settled that a dismissal of a case for want of prosecution under Rule 41(b) is largely a matter for the discretion of the trial court. In the Ordnance Gauge case, supra, the Court of Appeals affirmed the action of this Court in dismissing the case, but the Court of Appeals did not go so far as to say that a refusal to dismiss would have been error.

There certainly are many points of similarity between the situation in the Ordnance Gauge case, supra, and that presented here. However, there are also some important points of difference. In the Ordnance Gauge case the plaintiff, having filed his complaint, did absolutely nothing for a period of approximately five and a half years, knowing full well that the case could not be tried until it was ordered upon a trial list. Thus, his inaction blocked the operation of the ordinary court machinery by which the case could have been reached for trial in two or three years at the most.

In the present case the counterclaimant ordered his case (that is the counterclaim) down for trial promptly. Thereafter it was deferred by the Court for some ten months for a proper reason—a postponement in no way chargeable to the counterclaimant. Beginning in March 1952 the counterclaimant's attorney had a right to expect (at least for a reasonable time) that the case would without action on his part be restored to the trial list by the clerk. As a matter of fact, it was on the point of being restored and would have been had he not advised the clerk that he would not be ready for trial. The result was that the clerk, instead of putting the case on the trial list so that it would come up for trial on the following list, kept it off the list, with other "deferred" cases. Thus, the only thing the counterclaimant in this case did which would operate to postpone the case was to notify the clerk, on August 27, 1953, that he was not ready for trial. In so doing, he had no reason to think that he was doing more than keeping it off one trial list or that it would not automatically appear on the list after that.

It seems to me that the question is, How soon should a party realize that the machinery of the court, which moves cases along for trial, is not working properly and that the trial of his case will in all probability be indefinitely deferred unless he does something about it?

Here, as soon as the counterclaimant learned through the Two Year notice that his case was in danger of dismissal, he ordered it for trial the second time and has not been in default in any way since. Although this is not strictly a case of a default judgment being asked for, the same general principles can well guide the Court in exercising its discretion. These principles are well stated in Tozer v. Charles A. Krause Milling Co., 189 F. 2d 242:

> "Matters involving large sums should not be determined by defualt judgments if it can reasonably be avoided. Henry vs. Metropolitan, 3 F.R.D. 142, 144 (DC Va. 1942). Any doubt should be resolved in favor of the petition to set aside the judgment so that cases may be decided on the merits. Huntington v. American, 4 F.R.D. 496, 498 (DC Va. 1945); Standard Grate Bar Co. vs. Defense Plant Corp., 3 F.R.D. 371, 372 (DC Pa. 1944). Since the interests of justice are best served by a trial on the merits, only after a careful study of all relevant considerations should courts refuse to open default judgments."

On the whole, I think that it would be an unduly harsh ruling to dismiss this case for want of prosecution.

The motion to dismiss the counterclaim is denied, and the counterclaimant's application that the case be not deemed abandoned is granted.

Standing Order adopted on May 2, 1958 by the United States District Court for the Eastern District of Pennsylvania, relating to Civil Jury Trials.

Preliminary Calls

The clerk shall hereafter publish, from time to time, a list of cases for preliminary call for jury trials in such number as the clerk deems necessary or the court may direct. At the call, counsel will be required to estimate the time required for trial and to designate trial counsel.

Counsel must appear at the call unless, before that date, the clerk has received written notice of an agreement for continuance signed by counsel for all parties. Such notice shall state the estimated time required for trial and shall designate trial counsel. Continuance by agreement may also be reported at the call. All agreements for continuance on preliminary call shall state the period of continuance, not exceeding three (3) months from the call date. Motions for continuance which are opposed or are for more than three (3) months will be heard at the call. Continuances to permit completion of discovery will be granted only for exceptional good cause. At the expiration of the continuance the case shall resume its numerical position in the trial calendar after the last case on the ready list.

Cases answered for trial at successive preliminary calls and cases for which the period of continuance has expired shall comprise the trial calendar. Whenever the trial calendar is substantially depleted, the clerk shall prepare and mail to counsel of record a supplemental list of cases for preliminary call, listing cases chronologically by trial date order. Where sufficient time intervenes between trial sessions the clerk will endeavor to publish or transmit to counsel a list of cases remaining upon the trial calendar, but it shall be the duty of counsel to keep informed of the position of their cases.

Pretrial Assignments

Pretrial conferences will be ordered and dates therefor fixed when the court deems such conferences desirable. Attendance of counsel familiar with the case shall be mandatory at pretrial conferences. Counsel should, in advance thereof, discuss settlement possibilities with opposing counsel and consult with clients to obtain, if possible, authority for settlement.

Ready List

The clerk shall continuosly maintain a ready list of at least 100 cases by timely addition to the existing ready list of cases from the trial calendar in appropriate order.

Continuance of cases on the trial calendar or ready list shall be granted by the clerk for a period not longer than one (1) month upon written stipulation of counsel. The clerk shall appropriately note each such continuance and the period thereof. No more than two (2) such continuances shall be granted in any case.

Motions for continuance of cases on the trial calendar or ready list which are opposed or are for more than one (1) month shall be made to the calendar judge.

Upon expiration of a continuance a case shall resume its numerical position in the appropriate list, but shall take no better position than number 10 on the ready list, unless otherwise ordered by the court.

No application to advance a case or for special listing will be considered except by petition, detailing the reasons for the application, which petition shall be served upon counsel for the opposing party at least three (3) days before it is filed with the court. The court may dispose of the matter upon petition and answer, if any, or may direct counsel to appear for a hearing.

Pool

On (1) week in advance of each trial session the calendar judge shall assign to the pool from the ready list sufficient cases to provide a pool at least equal to the number of judges assigned to such session multiplied by five (5). The calendar judge shall then assign one (1) case from the pool to each such judge. Thereafter, during each trial session, the pool shall be maintained by the clerk by transfer thereto of additional cases from the ready list as required. The clerk shall immediately notify counsel in the cases so transferred.

Counsel in cases in the pool at the opening of any trial session must be present, ready for trial. Counsel in cases thereafter transferred to the pool or deferred cases must be available, ready for trial on the morning after recepit of notice from the clerk of such transfer. Motions for continuance after such transfer shall be made to the calendar judge, but no case will be continued for any reason existing prior to transfer. Cases appearing in either the pool or among the deferred cases which are passed for cause for a fixed period shall be placed at the bottom of either the pool or the deferred cases, as applicable.

No attorney shall have more than one (1) case assigned to a judge and in the pool. No case shall be transferred to the pool if counsel for any party shall have filed a busy slip with the clerk. A busy slip shall be valid only when in writing signed by the designated trial counsel, indicating actual engagement in trial in another court of record or an expected call in a case on the list of a United States or Pennsylvania appellate court. The clerk shall note a busy slip for an attorney on trial or in the pool in this court.

Any case in the pool affected by a busy slip filed or noted subsequent to its transfer thereto and any case reached for transfer to the pool for which a busy slip has been filed or noted shall be placed in the deferred cases where it shall remain until release of the busy slip. Upon such release the case shall resume its numerical position in the

pool but shall take no better position than number 3 therein. At the conclusion of each trial session all busy slips shall be void.

In all published notices the deferred cases shall be titled "Cases Deferred for Engagement of Counsel" and shall be listed after the ready list.

Effective Date

This order shall be and remain effective on and after May 2, 1958, on which date the order entered September 30, 1957, is revoked, except for the continuance in being of the existing ready pool and the existing lists

Excerpts from the Rules of Civil Procedure of the United States District Court for the Eastern District of Pennsylvania effective as of September 1, 1959.

Rule 1 Effective Date; Revocation of Prior Rules

The Civil Rules of the United States District Court for the Eastern District of Pennsylvania are adopted this 30th day of June, 1959, and shall become effective the 1st day of September, 1959, except Rule 5 (Admissions to Practice), which shall become effective immediately.

All prior rules of this Court, except those relating to bankruptcy, admiralty and criminal practice and procedure are revoked upon the effective date of these Civil Rules.

Rule 2 Standing Orders, Effect Upon

Unless revoked expressly or by necessary implication by these Rules, all Standing Orders of Court now in effect shall remain in effect.

Rule 4 Calendar

The Chief Judge shall annually prepare, file and cause to be published the court calendar for the ensuing fiscal year which shall establish the times for civil and criminal trials, pre-trials, arguments, motions, naturalization and

other court business and the assignments of the judges. The calendar may be amended at any time by the Chief Judge or by any judge designated to act in his absence.

Rule 12 Expedition of Court Business

(*a*) Attorneys shall promptly advise the Clerk of the settlement or other final disposition of a case.

(*b*) No attorney shall, without just cause, fail to appear when his case is before the Court on a call, motion, pre-trial or trial, or shall present to the Court vexatious motions or vexatious opposition to motions or shall fail to prepare for presentation to the Court, or shall otherwise so multiply the proceedings in a case as to increase unreasonably and vexatiously the costs thereof.

(*c*) Any attorney who fails to comply with (*a*) and (*b*) may be disciplined as the Court shall deem just.

Rule 13 Stipulations of Counsel

(*a*) Stipulations of counsel relating to the business of the Court, except such stipulations at Bar as are noted by the Clerk upon the minutes or by the Court Reporter upon his notes, shall be written and signed.

(*b*) When the parties file with the Clerk a written stipulation for an extension of time to answer, plead or otherwise move, and no such prior extension has been granted (which shall affirmatively appear in the stipulation), the Clerk shall grant the stipulated extension for a period not exceeding thirty (30) days by endorsement upon the stipulation.

(*c*) Except as provided in paragraph (*b*), no stipulation between parties relating to procedure shall be effective until approved by the court. Except to prevent manifest injustice, the Court will refuse to consider parol evidence of any such stipulation not made in open court or in pre-trial conference.

Rule 14 Notices

All notices by parties or counsel shall be in writing.

Rule 18 Dismissal and Abandonment of Actions

Whenever in any civil action the Clerk shall ascertain that no proceeding has been docketed therein for a period of more than two successive years immediately preceding such ascertainment, the Clerk shall send notice to counsel of record, or, if none, to the parties, that unless the Court, upon written application filed within thirty (30) days from the receipt of such notice and upon good cause shown shall otherwise order, the action shall be dismissed. In the absence of such application to or order by the Court, the Clerk shall, without special order, enter upon the record "dismissed, without prejudice under Rule 18", and shall, upon application by defendant, tax the costs against the plaintiff.

Amendments, effective December 19, 1961, to Rules 4 and 12 of the Rules of Civil Procedure of the United States District Court for the Eastern District of Pennsylvania.

Rule 4(a) Trial Calendars

The Clerk shall separately maintain a general trial calendar for actions for trial to a jury and a general trial calendar for actions for trial without jury upon which, respectively, he shall list for trial all actions at issue, except protracted actions.

The Clerk shall also maintain a separate trial calendar for protracted cases.

Precedence shall be given to actions entitled thereto by any statute of the United States.

Rule 12(d) Protracted Actions, Designation of the Procedures Following

Whenever the Chief Judge, upon application of counsel or sua sponte, shall be of the opinion that the trial of an

action or the pre-trial proceedings therein are likely to be so protracted that the administration of the business of the Court requires it, he shall designate the action as a "Protracted" action and assign it to a Judge of the Court.

After such designation and assignment, all proceedings therein, including the trial, shall, unless otherwise ordered by the Chief Judge, be before the Judge to whom the action is assigned. No action so designated shall be or remain on the general trial calendars. All such actions shall be placed on a separate trial calendar maintained by the Clerk on which the Clerk shall note the Judge assigned and the trial date, when fixed by the Judge assigned.

When any motion is made or any action by the Court is sought, counsel shall, in addition to filing and serving the required papers, forthwith apply, in writing, to the assigned Judge for a time and place for a hearing thereon.

It shall be the duty of counsel for the party or parties seeking relief to inform the assigned Judge, in writing, when he is ready for trial and, in any event if six (6) months shall elapse without any proceeding in the action having been docketed, it shall be the duty of such counsel forthwith to advise the assigned Judge, in writing, of the status of the action.